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NETWORK SOLUTIONS, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DOE, Individually And On Behalf Of All Others Similarly Situated, Plaintiff, vs. NETWORK SOLUTIONS, LLC, Defendant.	No. C 07-5115 JSW DEFENDANT NETWORK SOLUTIONS, LLC'S REPLY IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE Judge: Hon. Jeffrey S. White Date: January 25, 2008 Time: 9:00 a.m. CrtRm: 2

I. Introduction

In its Request for Judicial Notice ("RFJN"), defendant Network Solutions, LLC ("Defendant" or "Network Solutions") asked the court to take judicial notice to four things: (i) the parties' Service Agreements (RFJN Exhs. 1-5); (ii) the applicable Privacy Policies (RFJN Exhs 6-8; (iii) the dictionary definition of "search engine" (RFJN Exh. 9); and (iv) cases in which other Courts have upheld the forum-selection clause in the Service Agreements (RFJN Exhs. 10-18). Plaintiff does not object to the court taking judicial notice of the definition of "search engine." His opposition to the RFJN ("Opposition" or "RFJN Opp.") argues only that the Court may not take judicial notice of the Service Agreements, Privacy Policies or the cases upholding the forum-selection clause. As set forth in the RFJN, and further discussed below, Plaintiff is incorrect.

II. The Court May Properly Take Judicial Notice of the Service Agreements and Privacy Policies

The Opposition asserts that the Service Agreement "is not once mentioned, let alone quoted or relied upon, in the Complaint." RFJN Opp. at 1:27-28. This is simply false. The Complaint quotes identical language contained in each version of the Service Agreement that Plaintiff repeatedly agreed to when he created and renewed his webmail account each year between October 2003 and October 2007. Compare CAC ¶9, with RFJN Exhs. 1-5 at RFJN 007, 0055-56, 0091, 0133, 0225. Plaintiff pretends that this language comes from Defendant's Privacy Policies, rather than the Service Agreements. RFJN Opp. at 1:28-2:2. But this is also untrue. Compare CAC ¶9 with RFJN Exhs. 6-9. The Privacy Policies are separate documents, incorporated by reference into the Service Agreements.

Further, the Complaint unambiguously concedes that the relationship between Network Solutions and its customers is contractual, admitting that "all Defendant's customers enter into a written agreement with Defendant." CAC ¶9. Moreover, all of the alleged "actual" damages set forth in the Complaint arise from fees that customers paid pursuant to the Service Agreement. See, e.g, CAC ¶ 30; Opp. at 7:10-22. Thus, the Service Agreements and incorporated Privacy Policies are integral to Plaintiff's claims.

As the RFJN demonstrates, where a complaint is premised upon documents that the plaintiff fails to attach, a defendant may attach the documents to a motion to dismiss in order to show that they do not support, or that they entirely preclude, the plaintiffs' claims. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir.1994) (overruled on other grounds). Courts also may consider the full text of documents that the complaint only quotes in part. In re Stac Electronics Sec. Lit., 89 F.3d 1399, 1405 n. 4 (1996), cert denied, 520 U.S. 1103 (1997). These rules preclude plaintiffs "from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based." Parrino v. FHP, Inc., 146 F.3d 699, 705 (9th Cir.1998). RFJN at 3:1-8; 4:17-20. Plaintiff attempts to distinguish Branch v. Tunnel and Parrino v. FHP, Inc. on their facts, because one case dealt with a deposition transcript and the other an insurance coverage plan, but he does not, and cannot, dispute the generally recognized principal that documents not attached to a pleading may be subject to judicial notice on a motion to dismiss where they are central to the claims set forth in the pleading.

Plaintiff also offers the unsubstantiated assertion that "there is a serious dispute as to what version(s) of the agreement would apply to Plaintiff and what portion(s) of that agreement, if any, are enforceable." RFJN Opp. at 1:20-23. Under Federal Rule of Evidence 201, however, a judicially noticed fact must be one not subject to reasonable dispute. Nothing in the Complaint, in Plaintiff's opposition briefs, or in the declaration Plaintiff filed in support of his opposition briefs gives rise to a reasonable dispute that the Service Agreements or Privacy Policies are what they purport to be. Plaintiff merely offers the conclusion of a dispute without any explanation or factual foundation.

In fact, Plaintiff admits in his Opposition to Defendant's Motion to Strike Under Federal Rule of Civil Procedure 12(f) that the Service Agreement currently can be found online. See Plaintiff's Motion to Strike Opposition at fn. 2 (identifying the Service Agreement "that existed, as of December 14, 2007, on Defendant's website," and referencing http://www.networksolutions.com/legal/static-service-agreement.jsp). Plaintiff even quotes in his Motion to Strike Opposition the same "Exclusive Remedy" provision

that is found in the Service Agreements attached to Defendant's Request for Judicial Notice. Compare Motion to Strike Opposition at 2:10-11:2 with RFJN Exh. 1-5 at RFJN 0003-04, 0052-53, 0088-89, 00127-28 and 0222. In other words, he concedes that Network Solutions' Service Agreement is currently available and readily accessible online, and that it contains the same binding provision as that found in Exhibits 1-5 of the Request for Judicial Notice. Thus, far from raising a "reasonable" dispute as to the authenticity of the Service Agreement, Plaintiff's recognition of its widespread availability online confirms that no such controversy exists.

Moreover, it is not necessary that the agreements, or any particular provisions be enforceable (which they are) for the Court to take judicial notice of them. For instance, the Service Agreements are selectively quoted in an apparent attempt to support Plaintiff's false and misleading advertising claims under the Unfair Competition Law and California Legal Remedies Act. Yet these same documents provide clear disclosure to Plaintiff and other customers about the services that Network Solutions would provide, including the fact that webmail accounts were not guaranteed to be "SECURE OR ERROR-FREE." Under these circumstances, the agreements are properly subject to judicial notice.

III. The Court May Properly Take Judicial Notice of the Cases Upholding the Forum-Selection Clause

Plaintiff states in his Objection that "[d]ocuments that are part of the public record may be judicially noticed to show, for example that a judicial proceeding occurred or that a document was filed in another case. But a court may not take judicial notice of findings of fact from another case, or use such findings against Plaintiff, who was not a party to that case." Opp. at 3:14-17. Network Solutions does not dispute this, however, this is not the point. The cases offered attached as RFJN Exhibits 10-18 are offered to demonstrate that other courts have considered the same forum-selection clause at issue in this case. These cases, which at this time are not readily available on Westlaw or Lexis, also constitute persuasive authority from multiple jurisdictions supporting Defendant's motion to dismiss

or transfer this action to the courts of Virginia, consistent with the requirements of the forum-selection clause.

Date: December 21, 2007

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